

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALFREDO HERRERA

Claimant

VS.

RESER'S FINE FOODS

Respondent

AND

WAUSAU UNDERWRITERS INSURANCE CO.

Insurance Carrier

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Docket No. 1,033,726

ORDER

Claimant appealed the April 28, 2008, Award entered by Administrative Law Judge Brad E. Avery. The Board placed this appeal on its summary docket for disposition upon the parties' written arguments.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for claimant. Lynn M. Curtis of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant injured his low back on October 20, 2006, while working for respondent. In the April 28, 2008, Award, Judge Avery averaged the 5 percent whole person functional impairment rating provided by the treating physician, Dr. John M. Ciccarelli, with the 10 percent whole person functional impairment rating provided by claimant's medical expert and awarded claimant a 7.5 percent permanent partial disability under K.S.A. 44-510e.

Claimant contends his permanent partial disability should be increased to 10 percent because both experts agreed claimant had radiculopathy, which would place claimant's

injury in the DRE (Diagnosis-Related Estimates) Lumbosacral Category III under the AMA *Guides*¹ for a 10 percent whole person functional impairment. Claimant argues Dr. Ciccarelli disregarded the *Guides* when assessing claimant's impairment as the doctor explained they "are just guides that he utilizes in addition to his own opinion regarding the patient."²

Conversely, respondent contends the Award should either be affirmed or modified to reduce claimant's permanent partial disability to 5 percent. Respondent argues Dr. Ciccarelli determined claimant had a 5 percent whole person impairment because he displayed only mild residual complaints at his last medical appointment. Moreover, respondent argues Dr. Ciccarelli appropriately used the *Guides* as a guide in determining claimant's functional impairment and that "[t]here is no current objective evidence to support a level of radiculopathy to place claimant in DRE category III."³ In short, respondent argues if one of the impairment ratings is more credible than the other it is Dr. Ciccarelli's as deference should always be given to the treating physician.

The only issue before the Board on this appeal is the extent of claimant's functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant injured his low back on October 20, 2006, while lifting a bucket of dough. The parties stipulated claimant's accident arose out of and in the course of his employment with respondent.

After trying physical therapy and medications to no avail, claimant eventually began treating with Dr. John M. Ciccarelli, a board-certified orthopedic surgeon. In early June 2007 Dr. Ciccarelli saw claimant the first of four times and recommended an epidural injection and possible surgery. MRI results the doctor reviewed indicated claimant had desiccatory changes at L3-4, L4-5, and L5-S1. The MRI results also indicated claimant had a broad based annular bulge and ligamentous facet hypertrophy causing bilateral

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

² Claimant's Brief at 3 (filed June 5, 2008).

³ Respondent's Brief at 4 (filed June 25, 2008).

neuroforaminal narrowing with the narrowing worse on the left. Consequently, the MRI helped explain why claimant had bilateral lower extremity radiculopathy.

Claimant elected the injections. When Dr. Ciccarelli saw claimant for the last time in early September 2007, claimant reported significant improvement in his leg pain to the point he was ready to return to his normal activities. Consequently, the doctor released claimant to return to work without restrictions.

Claimant has returned to work for respondent, who has accommodated claimant's low back injury by permitting him to avoid lifting and handling heavy items. Accordingly, claimant requests permanent disability benefits based upon his functional impairment rating. And the record contains the impairment ratings from two medical experts.

Dr. Ciccarelli found claimant had minor residual radiculopathy and rated claimant as having a 5 percent whole person functional impairment. According to the doctor, he determined that rating by using the *Guides* and his personal opinion. The doctor testified, in part:

Q. (Ms. Curtis) And how did you come up with the 5 percent rating?

A. (Dr. Ciccarelli) That was a combination of utilizing the AMA Guides 4th Edition as well as just, you know, my opinion regarding his functional ability at the time I last saw him as well.

Q. What did you rate him based on the DRE categories or did you rate him based on the range of motion model?

A. I typically will use, as a guide, the DRE. I think they're more -- they're usually somewhat better defined than range of motion, that can be very variable and I tend to find those not to be as useful, in addition to just my overall opinion on what I felt it basically is at the time I rate the patient.

Q. What DRE category did you place Mr. Herrera in?

A. That would be category two.

Q. Why did you place him in category two rather than category three?

A. Well, based on his pretty much marked improvement to the point that he was wishing to go back to his normal activity and really had noticed no -- no limitation on his examination, no significant pain as he was having before and I felt that he had a somewhat just minor residual complaint but nothing that would impair his ability to go to do his normal routine. I don't feel he had any continuing significant pain or

atrophy weakness or specific objective loss that would be more appropriately placed in a category three type radicular type problem.

Q. And I note the AMA Guides note that DRE lumbosacral category three includes radiculopathy and your report here says that he had minor residual radiculopathy.

Can you explain to me why you didn't put him in a category three?

A. Again, I didn't feel his symptoms that were very minor, if any residual, continued to provide -- continue to fall within classifications involving what would be felt according to the guides to be a category three, and I felt his symptoms were of a minor impairment for him and felt to be more appropriately placed under a category two and, again, these are guides which I utilize in addition to my own opinion regarding the patient.⁴

Dr. Ciccarelli last saw claimant in early September 2007 when he released claimant to return to regular work.

Claimant's attorney hired Dr. Lynn A. Curtis, who is board-certified in physical medicine and rehabilitation, to evaluate claimant. The doctor first examined claimant in late February 2007 and recommended a surgical consultation. In mid-September 2007, Dr. Curtis examined claimant a second time and determined claimant's bilateral lumbar radiculopathy had improved but also found claimant had ongoing sensory loss related to the L5 and S1 dermatomes on the right and sensory loss related to the S1 dermatome on the left.

Dr. Curtis rated claimant as having a 10 percent whole person functional impairment under the *AMA Guides* due to the lumbar radiculopathy. According to Dr. Curtis, claimant had various objective findings to substantiate his radiculopathy. The doctor testified, in part:

Q. (Mr. Fincher) Can you tell us what objective and what subjective evidence he had of radiculopathy? Start with the objective first.

A. (Dr. Curtis) The objective is what I just said before about the findings on the MRI showing injury to the nerves, L5 bilaterally and S1 on the left.

And then the objective physical finding[s] would include the following, which he has a combination of middle spasm on the right thoracolumbar paraspinal muscles. He had limitations on lumbar range of motion. His compression test with his Lesague Maneuver, L-E-S-A-G-U-E, which is called a seated straight leg raising

⁴ Ciccarelli Depo. at 7-9.

test, is positive on both right and left. His deep tendon reflexes decreased on the left side, which would reflect a peripheral nerve or root injury on the left leg.

His compression test for lying down straight leg raising test was positive bilaterally. He has had loss of sensation using a Wartenburg Wheel, W-A-R-T-E-N-B-U-R-G, on his left lateral calf and left lateral foot. And he also had loss of sensation on the right lateral calf and between the toes on the right with a Wartenburg Wheel.

Initially in the examination he had weakness on the left of his ankle dorsal flexion -- excuse me, ankle eversion, which means if he moves his ankle outward and his toe extension that means moving his toe upward, those were both weak, both indicative of L5 nerve root compression. And then on the right leg he had weakness of his ankle eversion, which again is an L5 nerve root muscle.

Subsequently on the second visit his motor strength had improved to norm. He still had loss of sensation on the left lateral foot on the following final exam, which would be the S1 dermatome. In his final exam his compression test was still positive on the right lower extremity -- his compressions were positive on the right lower extremity.⁵

Dr. Curtis estimated that approximately 25 percent of his practice is related to Kansas workers compensation injuries and that he is hired by claimant attorneys approximately 10 times to every 1 time he is hired by an employer or its insurance carrier. Conversely, most of Dr. Ciccarelli's referrals are from insurance carriers. Dr. Ciccarelli could not recall the name of any claimant attorney for which he had evaluated an injured worker and could not recall how long ago he had provided such an evaluation.

At his February 2008 regular hearing, claimant testified he had ongoing symptoms into his legs as he has pain that intermittently shoots from his hips to his knees and he experiences weakness in his legs.

The Judge averaged the two impairment ratings and found claimant sustained a 7.5 percent whole person functional impairment due to his October 20, 2006, low back injury. The Board affirms that finding as it is not persuaded either doctor's impairment rating is more accurate than the other. Accordingly, the Board adopts the findings and conclusions set forth in the April 28, 2008, Award to the extent they are not inconsistent with the above. In short, the Award should be affirmed.

⁵ Curtis Depo. at 6-8.

AWARD

WHEREFORE, the Board affirms the April 28, 2008, Award entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of August, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

We respectfully disagree with the majority and find that the greater weight of the evidence establishes that claimant has radiculopathy into his legs as a result of his low back injury, which constitutes a 10 percent whole person impairment under the *AMA Guides*.

There is no dispute that claimant has symptoms that radiate into his legs. Both doctors agree. But Dr. Ciccarelli did not feel those symptoms were significant enough to place claimant in the DRE Lumbosacral Category III. Dr. Ciccarelli, however, has not seen claimant since September 2007 and is not aware of the ongoing radicular symptoms claimant now experiences upon his return to work. Claimant's testimony is uncontradicted that he intermittently experiences sharp pain into his legs and that he also experiences weakness in his legs. Moreover, Dr. Ciccarelli was not asked to consider what his rating might be should he consider claimant's present symptoms. Indeed, there is no evidence that Dr. Ciccarelli is even aware of those symptoms.

Both doctors agree the *Guides* rate a lumbosacral injury with radiculopathy at 10 percent to the whole person. And the radiculopathy is established by claimant's testimony, the testimony of both doctors, and the MRI results.

In conclusion, claimant has sustained a 10 percent whole person impairment and he should, therefore, receive permanent disability benefits for that impairment.

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Lynn M. Curtis, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge